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In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

RONALD A. GRAY,
Specialist Four, United States Army,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Navy-Marine Corps Appellate Defense Division represents Sailors and Marines on appellate review of court-martial convictions.[1] Among the Division's clients are the three Marines who are currently sentenced to death.

SUMMARY OF THE ARGUMENT

The two most significant defects in the military death penalty system are the method of selecting and size of court-martial panels, which are the functional equivalent of juries. Granting certiorari will allow the Court to determine whether these defects render the military capital punishment system too unfair and unreliable to satisfy service members' constitutional rights.

ARGUMENT

BECAUSE CAPITAL COURTS-MARTIAL MUST BE TRIED BEFORE MEMBERS, DEFECTS CONCERNING PANEL SIZE AND THE MEMBER SELECTION PROCESS POSE ENORMOUS DANGER TO THE MILITARY DEATH PENALTY'S FAIRNESS AND RELIABILITY.

Systemic defects concerning court-martial panel size and member selection are particularly significant in capital cases. Unlike defendants in non-capital courts-martial, capital defendants may not elect trial by military judge alone. Uniform Code of

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[1] Both parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. The United States Government bore the sole financial cost of preparing this brief. No one else made a monetary contribution to the preparation or submission of this brief.

Military Justice (UCMJ) art. 18, 10 U.S.C. § 818 (1994). The Court of Appeals for the Armed Forces has rejected constitutional challenges to this statutory provision. *See, e.g., United States v. Loving*, 41 M.J. 213, 291 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996). Thus, military capital defendants cannot have their verdict and sentence determined by independent military judges. *See Weiss v. United States*, 510 U.S. 163, 179-81 (1994). Instead, their lives rest in the hands of variably-sized panels handpicked from among the subordinates of the very person who chose to prosecute them and to seek the death penalty.

A. THE MILITARY JUSTICE SYSTEM'S DEPARTURE FROM THE UNIVERSAL CIVILIAN PRACTICE OF TWELVE-MEMBER CAPITAL JURIES WARRANTS REVIEW.

Despite the uniform civilian practice to the contrary, capital courts-martial can be, and often are, tried before panels with fewer than twelve members. Incredibly, a five-member panel can impose a death sentence even though a five-member civilian jury would be unconstitutional in any trial that could result in more than six months' confinement. *See Ballew v. Georgia*, 435 U.S. 223 (1978); *Baldwin v. New York*, 399 U.S. 66 (1970).

Five-member courts-martial have not always been permissible. The 1775 Articles of War governing the Continental Army required that general courts-martial consist of thirteen officers. Articles of War of June 30, 1775, art. 33, 2 J. Cont. Cong. 111, 117 (1775). This requirement grew from the British Articles' requirement for thirteen members, a rule that dates "at least to 1666." Frederick Bernays Wiener, *American Military Law in the Light of the Mutiny Act's Tricentennial*, 126 Mil. L. Rev. 1, 8 (1989). Congress authorized courts-martial with as few as five members in 1786, after finding that some Army detachments had an insufficient number of officers to convene a thirteen-member court-martial. Articles of May 31, 1786, 30 J. Cont. Cong. 316 (1786). At that time, when only commissioned officers could serve as court-martial members, the entire Army contained fewer than forty officers. Richard Kohn, *Eagle and Sword* 70 (1975).

While five-member courts-martial were a necessity in 1786, they are not today. The authorized strength for Department of Defense active duty forces on September 30, 2000, was 1,385,432. Nat'l Def. Auth. Act for Fiscal Year 2000, Pub. L. No. 106-65, § 401, 113 Stat. 512, 585 (1999). Obtaining twelve court-martial members from among well more than one million active duty personnel, including approximately 200,000 commissioned officers,[2] would pose no burden on the American military.

Nor would holding that the Constitution requires twelve-member capital courts-martial invalidate any congressional statute. The UCMJ does not forbid twelve-member panels, but rather mandates panels with at least five members. UCMJ art. 16(a)(1)(A), 10 U.S.C. § 816(1)(A) (1994). Thus, Congress has no policy against twelve-member capital court-martial panels. If the current system were held to be constitutionally deficient, the defect could be cured consistently with the UCMJ.

A particularly disturbing aspect of the current court-martial size rules is the lack of a fixed number of members, whatever that fixed number may be. In the military justice system, a death sentence can result only if the members unanimously convict the defendant of a death-eligible offense, unanimously find the existence of a designated aggravating factor, unanimously conclude that the aggravating circumstances substantially outweigh the mitigating circumstances, and unanimously conclude that death is the appropriate punishment. *See United States v. Simoy*, 50 M.J. 1, 2 (1998). "[B]ecause of requirements for unanimous votes, any one member at any stage of the proceeding [can prevent] the death penalty from being imposed." *Id.* at 3. Thus, with a twelve-member court-martial, the prosecution must win forty-eight votes to obtain a death sentence. Where only six members sit on the panel, as in petitioner's case, the prosecution need win only twenty-four votes. The crucial impact of panel size is apparent.

The combination of the requirement for unanimity and the variable panel size creates an inherent bias for the prosecution in the impaneling process. Because smaller panels favor the government, the prosecution has an incentive to voir dire the

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[2] *See Uniformed Services Almanac* 2000 at 245 (2000).

members and exercise challenges vigorously. The defense, on the other hand, has an incentive not to engage in voir dire or challenges. This is akin to giving the wolves and the sheep an equal opportunity to reduce the number of shepherds. The system transforms the facially-neutral voir dire and challenge procedures into weapons wielded exclusively by the prosecution. Capital court-martial panels tilting toward the government are the inevitable result.

In addition to producing biased panels, the lack of a fixed number of members allows an arbitrary factor to influence who is sentenced to death. Common sense suggests that the number of members impaneled at the end of voir dire and challenges will vary directly with the number of members originally detailed to the court-martial. Yet convening authorities have no guidance concerning how many members to appoint to capital cases beyond the requirement that the final panel include at least five members. Thus, the likelihood of a military defendant being sentenced to death is impacted greatly by the convening authority's unconstrained discretion, the very definition of arbitrariness. Such a system cannot survive Eighth Amendment scrutiny.

B. TRYING A CAPITAL COURT-MARTIAL BEFORE MEMBERS HANDPICKED BY THE SAME COMMANDING GENERAL WHO CHOSE TO PROSECUTE THE CASE IS FUNDAMENTALLY UNFAIR TO MILITARY DEFENDANTS.

Allowing the defendant's commanding general to handpick the court-martial's members directly threatens the tribunal's fairness. In some military justice cases, convening authorities or their staffs have manipulated the selection process to stack the resulting panels. For example, in *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991), the convening authority's staff selected members based on whether they were perceived to support "a command policy of hard discipline." *Id.* at 441. In *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988), the convening authority had a practice of detailing at least two female members in rape or sexual misconduct cases. In *Smith*, the command also asked a prosecutor

to suggest potential members. The prosecutor recommended three military police officers, one of whom was detailed to and sat on the court-martial panel. *Id.* at 247-48. Other examples of court-stacking abound. *See* Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three–Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1, 51-53 (1998).

The true extent of convening authorities' abuse of the member selection process to affect cases' outcomes will never be known because improper command influence "is difficult to see and harder to prove." *United States v. Haagenson*, 52 M.J. 34, 37 (1999) (Sullivan, J., concurring). Indeed, the egregious court-stacking in *United States v. Smith* "would never have been uncovered if the [convening authority's] legal clerk had not been taking a college course from the civilian defense counsel." 27 M.J. at 252 (Cox, J., concurring). Such a fortuity is unlikely to occur in many cases. A system so vulnerable to surreptitious manipulation is insufficiently fair and reliable to take a person's life.

CONCLUSION

The military justice system as a whole would benefit from the Court granting the petition. Currently, only six service members are under death sentences,[3] only four of whom were tried by panels of fewer than twelve members.[4] If the Court were to invalidate the current capital court-martial size or selection system, the number of cases requiring retrials would likely be smaller now than in the future. Resolving these issues now would

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[3] Major Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals*, Army L., May 2000, at 103, 104 [hereinafter *New Developments in Military Capital Litigation*].

[4] In *United States v. Kreutzer, appeal docketed*, No. ARMY 9601044 (A. Ct. Crim. App. Sept. 30, 1996), and *United States v. Quintanilla, appeal docketed*, No. 9801632 (N-M. Ct. Crim. App. Oct. 5, 1998), death sentences were imposed by twelve-member court-martial panels.

promote judicial economy. Additionally, the Court should evaluate the military death penalty's fundamental fairness before the military carries out its first execution since 1961. *See New Developments in Military Capital Litigation*, *supra* note 3, at 104 n.13.

Respectfully submitted,

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